OKLAHOMA SCHOOL LANDS—INDEMNITY.

DYKE BALLINGER ET AL.

Lands claimed as school indemnity should not be leased under section 36, act of March 3, 1891, until the validity of the selection has been determined by the department.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 13, 1891.

I have considered the appeal of Dyke Ballinger from your decision of December 14, 1891, holding that the attempted leasing of certain tracts therein described in lieu of lost school lands situate in Beaver county, Oklahoma Territory, (being a part of the Public Land Strip) was irregular and unauthorized, for the reason that the mere location of said lands by the filing of a list in the county clerk's office is not sufficient to withdraw them from disposal; that in order to withdraw said lands from disposition under the public land laws lists thereof must be filed in the district land office, and until the validity of such selections shall be determined by the Department, the land included therein should not be leased under the provision of section 36 of the act of Congress approved March 3, 1891, (26 Stat., 989, 1043).

The appellant has not pointed out any error in said decision, and none has been discovered by the Department. It is accordingly affirmed.

MINING CLAIM—STONE LANDS.

MCGLENN *v.* WIENBROEER.

Land that contains a valuable deposit of stone that is useful for special purposes may be entered as a placer claim.

The case of Conlin *v.* Kelly cited and distinguished.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 12, 1892.

This case is brought to the Department, by an appeal by Thomas McGlenn from your decision of October 6, 1890, in which you held for cancellation his homestead entry for the SE. ¼ of the SE. ¼ of Sec. 10, the SW. ¼ of the SW. ¼ of Sec. 11, and the NE. ¼ of the NE. ¼ of Sec. 15, all in township 33 S., range 64 W., Pueblo land district, Colorado.

From the record before me, I learn that on the 28th of October, 1886, William Wienbroeer filed his pre-emption declaratory statement for this land, and made settlement and established his residence thereon at that time, and has ever since resided there with his family. His buildings and improvements are quite valuable and extensive.

Finding the land not suitable for farming purposes, but containing large quantities of very superior sandstone, he opened several quarries thereon and commenced operating the same. Believing that the land was subject to entry as placer mines, Effie Maria Wienbroeer, and five other persons, each located a placer mine of twenty acres, upon the tract. All of these mines were located prior to the 3rd day of July, 1889, and covered the whole one hundred and twenty acres for which Wienbroeer had filed his preëmption declaratory statement. On the 30th of August, 1889, all these placer mines were sold and assigned to Wienbroeer, and on the 19th of September, of that year, he made mineral application for patent for the land.

Prior to this, however, to wit, on the 3rd of July, 1889, Thomas McGlenn made homestead entry for the same tract. Notice of Wienbroeer's application for patent was published according to law, and McGlenn was notified thereof, and specially cited to show cause why Wienbroeer should not be allowed to make entry, and pay for the land.

On the 11th of October, 1889, McGlenn filed in the local office an affidavit, in which he alleged that he was well acquainted with the land, and that it was more valuable for agricultural than for mineral purposes; that his homestead application therefor was not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes. He therefore asked for a hearing, at which he might be allowed to substantiate the allegations contained in his affidavit.

A hearing was therefore ordered, at which a very large amount of testimony was taken, resulting in a decision by the local officers on the 20th of May, 1890, in which they held in substance that each smallest legal subdivision embraced in the tracts was shown by a preponderance of the testimony to be mineral in character, and more valuable for mineral than for agricultural or grazing purposes. In appealing from that decision the counsel for McGlenn alleged that the local officers erred in holding that McGlenn failed to show that "the land at present has any intrinsic value for agricultural purposes, and its value for grazing purposes is also slight", and in holding that "the land is worth at least $50.00 per acre for the purpose of stone quarrying, and is scarcely worth the nominal government price of $1.25 per acre for agricultural and grazing purposes", and that they also erred in being influenced by the fact that McGlenn had not established his actual residence upon the tract at the time of the trial.

The decision of the local officers was affirmed by you, on the 6th of October, 1890.

There is not much conflict in the evidence as to the facts. McGlenn did not attempt to show that the land was valuable for the purposes of cultivation, but that it could be successfully used for grazing. As to its value for this purpose the witnesses varied somewhat in their estimates. Numerous exhibits help to make up the record, those from E

to Q inclusive, being photographic views, showing the surface of the ground where quarries have not been opened, also the quarries and the products thereof, together with fine blocks of buildings, constructed from, or trimmed with stone from such quarries.

The preponderance of the evidence submitted, was that the land possessed but little value for any agricultural purpose except grazing, but that its principal value was on account of the large quantity of stone which it contains. This stone was shown to be of very superior quality for building, monumental, and other purposes, and that it could be readily cut, sawed, and turned into any desired form, such as blocks, square and round columns, grindstones, etc.

Wienbroeer testified that he had resided upon the land with his family, since making his preemption filing, and that his buildings, consisting of house, barn, sheds, etc., were extensive and valuable. He also had numerous derricks, and other machinery and tools for operating his quarries, together with horses, cattle, etc. He had operated quarries upon the land for over three years, and from personal examination, and inspection in detail, he knew that the ledges of good building stone thereon were practically inexhaustible, and that they extended so as to cover and penetrate the entire one hundred and twenty acres. He had quarried and sold from four to five thousand dollars worth of stone each year, since he commenced operating his quarries, and aside from the stone used in the city of Trinidad, he had shipped large quantities to Denver, Pueblo, Rocky Ford, Lamar, Colorado Springs, West Las Animas and New Mexico, and had also "shipped grindstones by the car load to California."

McGlenn made his homestead entry with full knowledge of the fact that Wienbroeer was actually residing upon the land at the time, and had resided there for several years. That he had extensive quarries, and machinery and appliances for operating them, and had spent large sums of money in developing them, and that he had valuable buildings upon the land.

The equities of the case are, therefore, all on the side of Wienbroeer.

In a decision rendered by the local officers, on the 5th of June, 1889, in a contest between Wienbroeer and one Mitchell, relating to two of the forty acre tracts of the land in question, it was held that said land was more valuable for mining than for agricultural purposes, and subject to entry under the mineral law. That decision was affirmed by you, and from your decision no appeal was taken, so that the question in that case was not passed upon by the Department.

In answer to the appeal to your office in the case at bar, Wienbroeer, explains that the placer mines upon the tract were located in consequence of that decision by the local officers. In view of that decision, he believed that he could acquire title to the land in no other way than under the mineral laws, and hence his application for patent in accordance with such laws. He declared, however, that he stood ready to per-

fect title to the land as a mineral entry whenever the government would accept his money, and that he also stood ready to enter it under the settlement laws, in accordance with his pre-emption filing, should the government decide that the land was not subject to entry under the placer mining laws.

From all the facts of this case, there can be no doubt but that this land was principally valuable on account of the stone which it contained. Practically, it possessed no other value, and was comparatively worthless for agricultural purposes. The question then is: Did these valuable deposits of stone render the land subject to entry under the mineral laws? In other words: Is stone a mineral within the meaning of these laws?

This question has been passed upon, both by the courts and by the Department. In Copp's United States Mineral Lands, in his digest of court decisions, on page 424, several cases are cited. In that of Rosse *v.* Wainman (14 M. & W., 859), it was said "the term 'mineral' is more frequently applied to substances containing metals, but in its proper sense, includes all fossil bodies or matters dug out of mines; in this sense, beds of stone may be included in the word mineral." In the case of Micklethwait *v.* Winter (5 English Law and Equity, 526), it was said: "Stone taken from quarries is a mineral."

In the case of William H. Hooper (1 L. D., 560), it was held that "whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on its account than for agricultural purposes, is mineral within the meaning of the mining laws." In the case of Maxwell *v.* Brierly, decided by Secretary Teller, April 16, 1883, (10 C. L. O., 50), it was held that "land more valuable for its deposits of stone, or whatever is recognized as mineral, than for agriculture, is mineral land, and subject to sale under the mineral laws."

Applying the doctrine of the last case cited, to the one at bar, and the mineral application of Wienbroeer must be allowed, while under section 2318 of the Revised Statutes of the United States, the homestead entry of McGlenn can not stand.

In the case of Conlin *v.* Kelly (12 L. D., 1), it was held that "stone that is useful only for general building purposes does not render land containing the same subject to appropriation under the mining laws, and except it from pre-emption entry." The facts in that case are very easily distinguishable from the facts in the one at bar. There, on November 19, 1879, William Kelly filed his pre-emption declaratory statement for the tract in controversy, completed his entry and made final payment on July 29, 1880. On January 20, 1887, nearly seven years after the entry was completed, B. M. J. Conlin filed his affidavit of contest charging that the entry was fraudulently made for the purpose of speculation, and to secure title to the land because of valuable mineral deposits therein, and that the entry was made for the benefit

of another party. Upon the trial it was shown that the mineral which it was claimed the land contained, was a ledge of unstratified extremely hard flesh colored rock, a species of rock which contained no trace of valuable metal, stone common to South Dakota which was of some value for building purposes, by way of use in foundations, cellars, walls, bridge abutments and other places where strong rough work was required, but it possessed little commercial value.

On this state of facts the Department held that the entry of Kelly should stand; that it would not cancel an entry which had been existing for seven years upon the plea that it was fraudulently made, on the ground that common building rock used for general purposes is mineral. In that case the equities as well as the law, were in Kelly's favor as they are in this, in Weinbroeer's. In that case the stone was useful *only* for general building purposes, while in this case the stone is not only useful for those purposes, but also very valuable for the ornamentation of buildings, and for monuments and other commercial purposes.

An act was approved on the 4th of August, 1892, entitled "An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws," which would allow the entry of lands, such as are described in the Conlin case under the placer mining laws, but under the facts and circumstances of this case, the provisions of law in force at the time Wienbroeer's application and McGlenn's entry were made, and the decisions of the courts and of the Department, upon the questions involved, I am clearly of the opinion that Weinbroeer's application for patent for the land should be granted, and that McGlenn's homestead entry should be canceled.

Had I not reached the conclusion that Wienbroeer was entitled to patent for the land under the mineral laws, I should have had no hesitancy, under the circumstances of the case, in allowing him to complete his entry under the pre-emption laws, as thirty-three months from the time of the filing of his declaratory statement had not expired when the controversy in regard to the land was initiated. In any event, therefore, I would have directed the concellation of the homestead entry of McGlenn, and have awarded the land to Wienbroeer. The decision appealed from is affirmed.

SECOND HOMESTEAD ENTRY—OKLAHOMA LANDS.

JOSEPH B. BALDWIN.

The right to make a second homestead entry conferred by section 13, act of March 2, 1889, can not be exercised where the original entry is made after the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 13, 1892.

On July 15, 1889, Joseph B. Baldwin made homestead entry No. 3046 for the SE.¼ of Sec. 24, T. 13 N., R. 5 W., Oklahoma City, Oklahoma Territory, and on January 30, 1890, he relinquished said entry for the